UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

YRC INC., D/B/A YRC FREIGHT

and Case No. 13-CA-087525

FRED ROSE, an Individual

Christina B. Hill, Esq.
for the General Counsel.

Jeffrey R. Vlasek and Todd A. Dawson, Esqs.,
(Baker Hostetler, Cleveland, Ohio)
for the Respondent.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Chicago, Illinois on January 17, 2012. Fred Rose, the Charging Party, filed the charge on August 17, 2012 and the General Counsel issued the complaint on October 24, 2012.

The General Counsel alleges that Respondent, YRC Freight, by its dock supervisor, Vito Caponigro, violated Section 8(a)(1) of the Act by denying the request of the Charging Party, Fred Rose, for a union representative during an interview on August 2, 2012. The General Counsel also alleges that Respondent violated Section 8(a)(1) in issuing Rose a warning letter because of Rose's refusal to answer questions in the absence of a union representative.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, is a trucking company. It has a facility in Bolingbrook, Illinois, where it annually derives gross revenues in excess of $50,000 from the transportation of freight in interstate commerce. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Local 179 of the

International Brotherhood of Teamsters, which represents employees at the Bolingbrook facility, is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

At about 7:47 a.m. on August 2, 2012, Respondent's dock supervisor, Vito Caponigro, saw the Charging Party, Fred Rose, in a tractor trailer, beginning to pull out of Respondent's yard. Rose had reported to work that day at his normal starting time of 6:00 a.m. Normally, Rose would be expected to leave Respondent's yard to drive his route and make freight deliveries by 6:30 to 6:45.

There is little, if any, dispute as to what occurred and what was said. Caponigro asked Rose why he was delayed leaving the yard. Rose replied by asking if Caponigro was conducting an investigation. Caponigro responded that he was asking Rose a question. Rose then stated that if Caponigro was conducting an investigation, he wanted a union steward present.

Caponigro told Rose there was no union steward present at the yard and asked him who he wanted to represent him instead. Rose asked to see a list of employees who were at the yard. Caponigro may have asked Rose again who he wanted to represent him, but then told Rose without further discussion that he was issuing Rose a disciplinary warning for misuse of company time, Tr. 34-35, 65-66. Caponigro did not ask Rose any more questions about why he was late leaving the yard after Rose requested union representation.

About a half hour after this conversation, Caponigro emailed other management officials about his encounter with Rose, G.C. Exh. 2. On August 8, Caponigro mailed Rose a letter stating that he was being warned regarding misusing company time on the morning of August 2, Jt. Exh. 2. In that letter Caponigro stated, "I asked you what were your delays. You could offer no valid reason as to why you were delayed."

Rose may have mailed Respondent a rebuttal letter on August 12, which may have been received by Respondent on August 17, giving his reasons for his delay in leaving the yard on August 2, G.C. Exh. 5. Caponigro and Respondent's terminal manager, John Ralston, testified they had not seen this letter prior to the January 17, 2013 hearing in this matter. Ralston testified the letter is not in Rose's personnel file. In any event, this letter is completely irrelevant to this case since it could not have been received until after Respondent issued Rose the warning letter.

Rose also filed a grievance on August 13, in which he alleged that Respondent violated the Union's collective bargaining agreement, but did not provide any explanation for his delay in leaving the yard on August 2. Due to the fact that the discipline did not rise to the level of a suspension it was not subject to the grievance procedure in the collective bargaining agreement.

Analysis

The term "Weingarten rights" refers to a decision of the United States Supreme Court in *NLRB v. Weingarten, Inc.,* 420 US 251 (1975) in which the Court held that the Board's construction of Section 7 of the Act, with regard to interviews with potentially disciplinary consequences, was permissible. That construction was that Section 7 creates a statutory right to

refuse to submit without union representation to an interview which the employee reasonably fears may result in the employee's discipline. The court noted that the Board's construction in *Weingarten* emanated from several prior cases in which the Board shaped the contours and limits of this statutory right.

The Court quoted extensively from the Board's opinions in *Quality Manufacturing Co.,* 195 NLRB 197 (1972) and *Mobil Oil Corp.,* 196 NLRB 1052 (1972). Thus the decision makes it clear that the parameters of the *Weingarten* right are those set forth by the Board. First the Board found it was a serious violation of the Act to deny an employee's request for union representation and compel the employee to *appear unassisted at an interview which may put his job security in jeopardy* (emphasis added).

Second, the right arises only where the employee requests union representation. Third, the right is limited to situations where the employee reasonably believes the investigation will result in disciplinary action. The Board noted that the rule did not apply to run-of –the-mill shop-floor conversations such as those in which the employee is given instructions or training or needed corrections of work techniques.

Fourth, the Board stated that the exercise may not interfere with legitimate employer prerogatives. Thus, the employer need not justify refusing to grant the employee union representation, but rather is entitled to conduct an inquiry into the employee's conduct without the employee's participation. The employer is then free to act on the basis of information derived from other sources. Fifth and finally, the Board noted that the employer has no duty to bargain with the union representative. It is free to insist that it is only interested in hearing the employee's own account of the matter under investigation.

It is condition #4 that is most relevant to the instant case. Respondent, by Vito Caponigro, was not required to accord Fred Rose union representation. Caponigro was well within his rights in disciplining Rose on the basis on the information he had on the morning of August 2. The Board in *Mobil Oil,* stated:

> The employer may, if it wishes, advise the employee that it will not proceed with the interview unless the employee is willing to enter the interview unaccompanied by his representative. The employee may then refrain from participating in the interview, thereby protecting his right to representation, but at the same time relinquishing any benefit which might be derived from the interview. The employer would then be free to act on the basis of information obtained from other sources.

At the time Caponigro decided to discipline Rose all he knew, from personal observation, was that Rose was at least an hour late leaving Respondent's yard. The fact that Caponigro did not decide to discipline Rose until he asked for union representation does not necessarily establish that Rose was disciplined for asserting his *Weingarten* rights. The fact that B occurred after A does not necessarily mean that B was the result of A, particularly when there is an alternative explanation for B.

Were I to conclude that Respondent's warning letter was motivated by a desire to retaliate against Rose for asking for union representation, I would find a violation of the Act.

However, such an inference is not warranted here. Rose was clearly an hour late starting his route and given his failure to offer Caponigro any explanation, I credit Caponigro's testimony that he disciplined Rose for misusing company time.[1]

The General Counsel's brief suggests at pages 6-7 that Caponigro knew the reasons for Rose's delay when he encountered Rose at 7:47. This, the General Counsel suggests, establishes that Rose was disciplined for insisting on his *Weingarten* rights. I reject any such argument for the following reasons: first, I decline to credit Rose's testimony as to the reasons for his delay in the view of Caponigro's testimony at Tr. 68-69 that he had personal knowledge that at least one of the reasons belatedly offered by Rose was false. Caponigro testified that the load that Rose was to deliver was ready for shipment on schedule.

The General Counsel relies on Rose's uncontradicted testimony about conversations with Respondent's dispatcher, Chris Zurales in suggesting that Caponigro knew that Rose had a legitimate excuse for leaving Respondent's yard an hour late. I find it unfair for the General Counsel to rely on testimony regarding Rose's conversations with Zurales given that she was not alleged to be an agent of Respondent until the day of trial. Moreover, there is no evidence that Zurales advised Caponigro of whatever transpired between her and Rose on the morning of August 2.

I also conclude that the General Counsel has not established that Rose reasonably believed that Caponigro's inquiry would result in disciplinary action. If the explanations Rose gave at trial and in his August 12 letter for the delay on August 2 are accurate, there is no basis for concluding that Rose reasonably feared discipline had he told Caponigro that he was late leaving the yard for the reasons he proffered belatedly.[2]

CONCLUSIONS OF LAW

Respondent did not violate the Act either in refusing to provide Fred Rose with union representation on August 2, 2012 or in issuing him a disciplinary warning letter.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

[1] Assuming the General Counsel made an initial showing of a statutory violation, I find that Respondent met its burden of proving a non-discriminatory motive for the warning.

[2] At trial and in his August 12 letter, Rose stated that he was leaving the yard late because his load wasn't ready on time, that he had been told by another manager to switch trailers due to the lack of air conditioning in the first trailer and that he had to get window washer fluid in the second trailer.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The complaint is dismissed.

Dated, Washington, D.C., February 15, 2013.

Arthur J. Amchan
Administrative Law Judge